No. 93-986

In The

Supreme Court of the United States

October Term, 1994

JOSEPH McINTYRE, EXECUTOR OF THE ESTATE OF MARGARET McINTYRE,

Petitioner,

v.

OHIO ELECTIONS COMMISSION,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Ohio

REPLY BRIEF OF PETITIONER

STEVEN R. SHAPIRO
JOEL M. GORA
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

DAVID GOLDBERGER
(Counsel of Record)
The Ohio State University
College of Law
Clinical Programs
55 West 12th Avenue
Columbus, Ohio 43210
(614) 292-6821

BARBARA P. O'TOOLE
Roger Baldwin Foundation of ACLU
203 North LaSalle Street
Chicago, Illinois 60601
(312) 201-9740

GEORGE Q. VAILE
776 County Road 24
Marengo, Ohio 43334
(614) 747-2218

Of Counsel
KEVIN F. O'NEILL
LOUIS A. JACOBS
ACLU of Ohio Foundation
1223 West 6th Street
Cleveland, Ohio 44113
(216) 781-6276

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. THE CLAIM OF THE OHIO ELECTIONS COMMISSION THAT THE § 3599.09 RESTRICTION ON CORE POLITICAL SPEECH IS NOT SUBJECT TO STRICT SCRUTINY IS ERRONEOUS. 4

II. THE CLAIMS OF THE OHIO ELECTIONS COMMISSION THAT § 3599.09 IS JUSTIFIED BY INTERESTS IN FRAUD PREVEN-TION AND IN A PROPERLY INFORMED ELECTORATE DO NOT SAVE IT FROM BEING UNCONSTITUTIONAL. 4

A. Neither the interest in fraud prevention nor in libel prevention justifies a flat ban on anonymous campaign leafletting. 4

B. This Court's campaign financing decisions do not support the Commission's claim that § 3599.09 can be justified as a means of voter education. 10

C. The Commission's assertion that there is no current need for anonymous political leafletting is wrong. 14

III. SECTION 3599.09 IS UNCONSTITUTIONAL AS APPLIED. 15

CONCLUSION 17

TABLE OF AUTHORITIES

Cases **Page**

Anderson v. Celebrezze, 460 U.S. 780 (1983) 3,11

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 8

Buckley v. Valeo, 424 U.S. 1 (1976) . . . . . *passim*

Burson v. Freeman, 112 S. Ct. 1846 (1992) 2

City of Ladue v. Gilleo, 114 S. Ct. 2038 (1994) 4

Colten v. Kentucky, 407 U.S. 104 (1972) 16

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 8

Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) 16

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 2,3,13

Forsyth County, Georgia v. The Nationalist Movement, 112 S. Ct. 2395 (1992) 8

Lovell v. Griffin, 303 U.S. 444 (1938) 2

Martin v. Struthers, 319 U.S. 141 (1943) 2

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 9

Page

Mills v. Alabama, 384 U.S. 214 (1966) 11

NAACP v. Alabama, 357 U.S. 449 3

New York Times v. Sullivan, 376 U.S. 254 (1964) 7

State of Ohio, ex rel. Taft v. Court of Common Pleas of Franklin County, 63 Ohio St.3d 190, 586 N.E.2d 114 (1992) 16

Riley v. National Federation of the Blind, 487 U.S. 781 (1988) 6

Schneider v. State, 308 U.S. 147 (1939) 2

Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 8

Talley v. California, 362 U.S. 60 (1960) 3,6,12

Texas v. Johnson, 491 U.S. 397 (1989) 9

Turner Broadcasting Systems, Inc. v. F.C.C., 114 S. Ct. 2445 (1994) 4

United States v. National Committee for Impeachment, 469 F.2d 1135 (2d Cir. 1972) 16

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) . . . 6

Page

Whitney v. California, 274 U.S. 357 (1927) 9

Wooley v. Maynard, 430 U.S. 705 (1977) 9

Statutes

2 U.S.C. § 434(c)(1) 13

2 U.S.C. § 434(e) 3,10

Ohio Revised Code § 3517.13(E) 15

Ohio Revised Code § 3517.10 12

Ohio Revised Code § 3517.10(D) 15

Ohio Revised Code § 3599.09 . . . . . *passim*

Ohio Revised Code § 3599.091(B) 8

Ohio Revised Code § 3599.092(B) 8

Other Authorities

Ohio, Opinion of Attorney General, No. 75-068 (1975) 13

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ARGUMENT

The Ohio Elections Commission rests its defense against the constitutional challenge to § 3599.09 on two faulty contentions. First, the Commission contends that the § 3599.09 flat ban on petitioner McIntyre's anonymous political campaign leaflets distributed in public places should not be subjected to the strict scrutiny this Court routinely applies to restrictions on core political speech. Second, the Commission contends that the need to prevent election fraud and to inform Ohio's electorate justifies special restrictions on election-related leafletting by private citizens on public forums. Neither contention is correct and neither justifies the

Ohio Supreme Court's decision that § 3599.09 is constitutional on its face and as applied.

I. THE CLAIM OF THE OHIO ELECTIONS COMMISSION THAT THE § 3599.09 RESTRICTION ON CORE POLITICAL SPEECH IS NOT SUBJECT TO STRICT SCRUTINY IS ERRONEOUS.

In attempting to defend the § 3599.09 prohibition against anonymous political campaign leaflets "designed to . . . influence voters in any election," the Commission argues that this Court should uphold § 3599.09 because it is part of a comprehensive framework of election regulation. (Resp. Br. 7-9). Using the approach employed by the Ohio Supreme Court, the Commission reasons that the presence of § 3599.09 in the Ohio Election Code somehow renders the statute immune from strict judicial scrutiny applicable to government restrictions on the content of core political speech.

The source of the Commission's claim that strict scrutiny is inapplicable lies in its refusal to recognize that traditional political leafletting in public places is entitled to the greatest protection that the First Amendment provides. *Lovell v. Griffin*, 303 U.S. 444 (1938); *Schneider v. State*, 308 U.S. 147 (1939); *Martin v. Struthers*, 319 U.S. 141 (1943). According to *Burson v. Freeman*, 112 S. Ct. 1846 (1992), statutes that govern leafletting and similar activities near polling places are to be measured by the highest level of judicial scrutiny. According to *Burson*, to sustain § 3599.09 "[t]he State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" 112 S.Ct. at 1851 (citations omitted).

In its effort to avoid application of strict scrutiny to § 3599.09, the Commission cites both *Buckley v. Valeo*, 424 U.S. 1 (1976) and *First National Bank of Boston v. Bellotti*,

435 U.S. 765 (1978). It contends that the § 3599.09 ban on anonymous political leaflets is the equivalent of the campaign financing legislation at issue in both *Buckley* and *Bellotti*. Unfortunately for the Commission's argument, the campaign financing laws in both of those cases were subjected to strict scrutiny. For example, strict scrutiny was applied in *Buckley* when this Court reviewed the constitutionality of § 434(e) of the Federal Election Campaign Act, which requires disclosure of independent campaign expenditures in excess of $100. The *Buckley* Court stated: "In considering this provision we must apply the same strict standard of scrutiny, for the right of associational privacy developed in *NAACP v. Alabama* [357 U.S. 449 (1958)], derives from the rights of the organization's members to advocate their personal points of view in the most effective way." 424 U.S. at 75 (citations omitted). Similarly, in *Bellotti* this Court stated, "The constitutionality of § 8's prohibition of the 'exposition of ideas' by corporations turns on whether it can survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech." 435 U.S. at 786.

The Commission's effort to avoid the precedential force of the use of strict scrutiny in *Talley v. California*, 362 U.S. 60, 65-66 (1960), is equally faulty. Instead of looking to *Talley*, the Commission contends that this Court should rely on *Anderson v. Celebrezze*, 460 U.S. 780 (1983). The Commission contends that the constitutionality of restrictions on the content of election-related streetcorner leaflets should be measured by the *Anderson* standard of review that is applicable to complex election codes which govern, among other things, a candidate's access to the election ballot. It should be noted that the standard of review employed in *Anderson* was strict enough to overturn a restrictive early filing deadline imposed by the Ohio election code.

Moreover, the Commission argues that this Court's selection of a standard of review should turn on the content of the leaflets at issue. If, as in *Talley*, the leaflets oppose race

discrimination, then the Commission apparently agrees that review should be by strict scrutiny. However, if the leaflets oppose passage of an increase in property taxes on a referendum ballot, then the Commission believes that a more relaxed standard of review should be applied. This argument overlooks the fact that political leaflets receive special constitutional protection because they are a time-honored means of political advocacy, and they are "an unusually cheap and convenient form of communication."[1]

II. THE CLAIMS OF THE OHIO ELECTIONS COMMISSION THAT § 3599.09 IS JUSTIFIED BY INTERESTS IN FRAUD PREVENTION AND IN A PROPERLY INFORMED ELECTORATE DO NOT SAVE IT FROM BEING UNCONSTITUTIONAL.

A. Neither the interest in fraud prevention nor in libel prevention justifies a flat ban on anonymous campaign leafletting.

The Commission claims that § 3599.09 is saved from unconstitutionality because the Ohio Supreme Court held that the statute was enacted to enable "identifying those responsible for fraud, false advertising and libel." (Pet. App. A.5). It asserts that this statement of legislative purpose is the equivalent of "a narrowing construction that is consistent with

[1]*City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2046 (1994). Moreover, the Court's recent decision in *Turner Broadcasting System, Inc. v. F.C.C.*, 114 S. Ct. 2445 (1994) compels the choice of strict scrutiny in this case. While *Turner* permitted the use of the intermediate standard of review applicable to content-neutral regulations, the Court reaffirmed strict scrutiny as the standard for review of government control over the content of messages expressed by private individuals. 114 S. Ct. at 2458-59.

constitutional demands." (Resp. Br. 16). This claim is wrong for several reasons.

First, judicial language that merely states the purpose of a statute does not supply a narrowing construction. Whatever the legislative purpose of § 3599.09, the statute's language is not confined to fraudulent or libelous communication. On the contrary, § 3599.09 requires that everyone responsible for the distribution of so much as a single leaflet must put his or her name and address on that leaflet -- whether or not the leaflet contains any "fraud, false advertising and libel." Indeed, the statute was enforced against the petitioner for distributing a leaflet that contained neither fraud nor libel. Moreover, the Ohio Supreme Court rejected the ruling by the Franklin County Court of Common Pleas that § 3599.09 had been unconstitutional as applied to Mrs. McIntyre. Therefore, it is erroneous for the Commission to claim that the statute, which flatly bans all distribution of anonymous leaflets containing election-related statements, has been narrowly construed by the Ohio courts.

Second, neither the Commission nor the Ohio Supreme Court explained what type of non-financial fraud would be prevented by § 3599.09 in referendum elections. Instead, both rely on the generalized claim that a flat ban on anonymous leafletting is necessary to deter or to prevent the possibility of fraud. The Commission attempts to amplify this proposition by asserting that the § 3599.09 compulsory disclosure requirement facilitates identification of those who might be violating other anti-fraud prohibitions in the Ohio Election Code. (Resp. Br. 11-12). The constitutional defect in this assertion lies in the fact that the flat ban on anonymous leafletting in § 3599.09 serves as a prophylactic tool which, in effect, presumes that all anonymous leafletting is inherently fraudulent and is therefore legitimately prohibited. This is forbidden by the First Amendment because the state "cannot

impose a prophylactic rule requiring disclosure" where the rule covers constitutionally protected political speech that is a normal part of political debate. *Riley v. National Federation of the Blind*, 487 U.S. 781, 803 (1988), (Scalia, J., concurring in part and concurring in judgment). Moreover, the implicit presumption that all anonymous leafletting is fraudulent is inconsistent with this Court's teaching in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 636-637 (1980), that laws designed to prevent fraud, but which also restrict speech, must be narrowly drawn.[2]

The Commission claims that the § 3599.09 ban on anonymous campaign leaflets about ballot issues is needed to protect private persons who might be libeled in such leaflets. (Resp. Br. 19). Its fear of the possibility of libelous statements in referendum election leaflets is insufficient to justify § 3599.09 for two reasons. First, the libel of a private person during a campaign for votes in a referendum election is distinct from the issue to be voted on. The appropriate remedy is a private one -- usually a civil tort action -- not a broad-gauge statute banning anonymous, non-libelous leaflets. Second, use of 3599.09 as a protection against private libels during referendum campaigns is an extension of Ohio's election law in order to facilitate redress of private grievances. The net impact of such an extension is to discourage non-

[2]In *Talley*, Justice Harlan's concurrence explicitly rejects the Commission's argument that a prophylactic ban is needed to enable Ohio to identify possible wrongdoers: ". . . I think it will not do for the State simply to say that the circulation of all anonymous handbills must be suppressed in order to identify the distributors of those that may be of an obnoxious character. In the absence of a more substantial showing as to Los Angeles' actual experience with the distribution of obnoxious handbills, such a generality is for me too remote to furnish a constitutionally acceptable justification for the deterrent effect on free speech which this all-embracing ordinance is likely to have." 362 U.S. at 66-67 (Harlan, J., concurring) (footnote omitted).

libelous leafletting and to deny public issue debate the "breathing space" that it relies on for its vitality. *New York Times v. Sullivan*, 376 U.S. 254, 271-272 (1964).

Moreover, even by the Commission's own measure, the narrowing construction contended for has not occurred. As conceded in the Commission's brief, § 3599.09 bans all anonymous leaflets designed to "influence the voters in any election." (Resp. Br. 8). The Commission relies on this language to explain the nature of the state interest that § 3599.09 is said to protect. However, in relying on the "influence the voters in any election" language, the Commission actually magnifies the open-ended character of the statute. Under its interpretation, any anonymous leaflet critical of an incumbent might violate the statute, even if, as in the case of a U.S. senator, the election might be five years hence. Also, pamphleteers would need to speculate at their own risk as to what publications would be designed to "influence the voters." A similar phrase was addressed in *Buckley v. Valeo*, 424 U.S. at 76-79. It was approved there only after this Court concluded it was limited to contributions or expenditures made to influence voters in candidate election campaigns. No such limiting construction of the similar language of § 3599.09 is available because § 3599.09 explicitly covers referenda as well as candidate elections. Indeed, if § 3599.09 could be narrowed to candidate elections, petitioner's referendum-related leafletting under the innocent circumstances of this case would not be the basis of penalties.

The absence of a genuine limiting construction of § 3599.09 is fatal. "In these circumstances, particularly where as here appellee offers several distinct justifications for the [statute] in its broadest terms, there is no reason to assume

that the [statute] can or will be decisively narrowed." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975).[3]

Insofar as elections are concerned, Ohio already has specific statutes that identify and prohibit false statements in both candidate and referendum campaigns. O.R.C. §§ 3599.091(B) and 3599.092(B).[4] These statutes explicitly address fraudulent attacks on individuals during the electoral process. However, the same cannot be said of a disclosure requirement imposed on unsigned leaflets distributed during a referendum election campaign.

Election fraud statutes cannot be applied to referenda in the same way that they can be applied to candidate elections. Referendum elections are distinctive. Typically the issue to be voted on in the referendum is printed on the ballot in its entirety and is readily available to the electorate prior to

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[3]Moreover, even if the opinion of the Ohio Supreme Court had narrowed section 3599.09, that construction would not "restore constitutional validity to a conviction that occurred . . . under the ordinance as it was written." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 155 (1969). Both the Commission and the amicus brief for the Council of State Governments erroneously suggest that the petitioner should not be challenging section 3599.09 because she testified that she intended to sign her leaflets and therefore did not appear to fear retaliation. Whether or not the petitioner intended to put her signature on her leaflets is beside the point. The central thrust of the petitioner's position is that § 3599.09 is unconstitutional on its face because of its substantial overbreadth. She was fined for violating it and is therefore entitled to challenge its validity. *Broadrick v. Oklahoma*, 413 U.S. 601, 609-611 (1973); *Forsyth County, Georgia v. The Nationalist Movement*, 112 S.Ct. 2395, 2400-2401 (1992). Moreover, there is evidence that there may have been subsequent retaliation for the distribution of the leaflets in the record. Ohio Supreme Court Justice Craig Wright outlined the indications of retaliation in his dissenting opinion below. (Pet. App. 10)

[4]These provisions are set out in Brief of Petitioner, 37-39, n.13.

the election. To the extent that the precise terms of the referendum issue are known to all, the terms speak for themselves. Thus, the voters in any school tax referendum election can read the proposition to be voted on to determine whether they will vote to increase taxes.

In both candidate and public issue elections, there is a large universe of speech that occurs in the political marketplace. Much campaign discourse is unidentified; even fully attributed speech may mislead. Under such circumstances, the traditional remedy in the political marketplace of ideas is to rebut false statements with true ones. *Texas v. Johnson*, 491 U.S. 397, 419 (1989) (citing *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

Because § 3599.09 is not confined to fraudulent attacks on political candidates, it would appear that the state's actual interest in § 3599.09 is in informing referendum voters about the referendum issue in the way that the state deems best. (Resp. Br. 26-27). Thus, in Ohio, the legislature has taken it upon itself to decide that voters must know the names and addresses of all speakers who choose to communicate their message by leaflets and similar means. (Resp. Br. 24). However, the state's interest in specifying how the electorate is to be informed clashes with the Bill of Rights. This is because the First Amendment does not allow the enforcement of legislation designed to compel political speakers to communicate specified information that the State of Ohio believes to be useful. State compelled speech has long been disapproved by this Court. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Wooley v. Maynard*, 430 U.S. 705 (1977).

B. This Court's campaign financing decisions do not support the Commission's claim that § 3599.09 can be justified as a means of voter education.

In an effort to persuade this Court that the § 3599.09 ban on anonymous referendum campaign leaflets is constitutional, the Commission relies on *Buckley v. Valeo*, 424 U.S. 1 (1976). In particular, the Commission contends that *Buckley*'s approval of campaign expenditure and contribution disclosure requirements supports the Ohio Supreme Court's holding with respect to leafletting in public places. (Resp. Br. 23).

The Commission's heavy reliance on *Buckley* is based on a misreading of that case. There is no indication in the *Buckley* opinion that the disclosure requirements it upheld extend beyond financial disclosures. Every governmental interest accepted as sufficiently important to justify disclosure of contributions and expenditures is stated in terms of financial interest. *See* 424 U.S. at 66-68 (where money comes from and how it is spent; deterrence of corruption by exposing large contributions and expenditures; means of gathering data to detect violations of contribution limitations); 424 U.S. at 80-81 (informational interest in expenditures advocating election or defeat of clearly identified candidates).

Employing a "strict standard of scrutiny," 424 U.S. at 75 to review § 434(e), which mandated disclosure of independent expenditures exceeding $100, the *Buckley* Court was careful to emphasize that the statute governed campaign spending explicitly related to candidates for public office. Without such a limitation to expenditures expressly advocating election or defeat of particular candidates, the Court recognized that even financial disclosure requirements could be

"treacherous" in deterring "those who seek to exercise protected First Amendment rights." 424 U.S. at 76-77.

The Commission also contends that *Buckley*'s approval of contribution and expenditure disclosures validates the constitutionality of § 3599.09 as a means to educate the electorate. Thus it argues that § 3599.09 enables voters to "judge the precise effect of a [ballot] measure by knowledge of those who advocate or oppose its adoption. . . . " (Resp. Br. 13). In making this argument, the Commission treats *Buckley* as though the case found a power in government to regulate the content of election debate rather than to protect against the potential for corruption and manipulation created by financial contributions and expenditures. On the contrary, this Court's decisions disapproving bans on electioneering editorials on election day make clear that the First Amendment forbids laws regulating the content of election-related publications in order to assure that voters will be informed about elections in a fashion that the government believes is best. *See Mills v. Alabama*, 384 U.S. 214 (1966) (voids statute prohibiting election day editorials urging voters to vote in a particular way).[5]

Moreover, the Commission's claim that § 3599.09 is a means to assure an informed electorate contradicts the rest of the Ohio Election Code. In fact, while campaign committees, political action committees, and political parties are required to disclose expenditures, there is no comparable provision in the Ohio Election Code that creates a duty for individuals to disclose the kind of financial information that would truly enable voters to identify persons who are making

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[5]This Court has rejected the notion that restricting or inhibiting the flow of information contributes to an informed electorate. *Anderson v. Celebrezze*, 460 U.S. at 798; Brief of Petitioner 33-34.

the unusually large independent expenditures that have the capacity to be unduly influential.[6]

Thus, § 3599.09 obliges a citizen-leafletter like Mrs. McIntyre to put her name on the comparatively few anti-tax leaflets that she could afford to have printed for public distribution. Yet, an extremely wealthy private citizen who is expending thousands of dollars to print leaflets to express opposing views is also required to place his name on each leaflet. He is not required to disclose the fact that he has expended vast amounts of money. Thus, the reader of each leaflet learns only the name of the responsible person and is unable to judge whether any of the participants in the debate over the referendum is actually playing a role that might possibly distort the debate.

The Commission makes much of the fact that *Buckley* distinguishes *Talley v. California*, 362 U.S. 60 (1960). (Resp. Br. 23-24). However, it is no surprise that the *Buckley* Court did not apply *Talley*'s protection of anonymous streetcorner leafletters to the campaign financing provisions of the Federal Election Campaign Act. In contrast to the *Talley* ordinance and the Ohio statute, the federal act is designed to remedy problems created by the huge sums of money contributed and expended during federal elections of candidates for public office. The Act was not designed to regulate the activities of a lone streetcorner leafletter. In fact, the *Buckley* Court went out of its way to protect speakers "engaged purely in issue discussion." 424 U.S. at 79.[7]

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[6]*See* Ohio Revised Code § 3517.10.

[7]Additionally, contrary to the Commission's assertion that *Buckley* sustained a disclosure threshold of $10, *Buckley* actually sustained distinct thresholds for recordkeeping and for disclosure. The $10 requirement identified in the Commission's brief established the threshold for

The Commission's reliance on *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), is equally misplaced. *Bellotti* invalidated a flat ban on corporate expenditures for the purpose of "influencing or affecting" the outcome of a ballot issue. Notwithstanding the fact that *Bellotti* is a campaign financing case, the Commission makes much of footnote 32 in *Bellotti*, also relied on by the Ohio Supreme Court, which suggests the possibility of financial disclosure requirements for business corporations expending resources to support or oppose passage of a ballot issue. 435 U.S. at 791-792 n.32.

The Commission fails to acknowledge that central to the disclosure issue addressed in the *Bellotti* footnote is the concern that a massive infusion of business corporation funds into a referendum campaign will have a disproportionate effect on the outcome. This is because private adversaries of the corporation's political position may not have matching resources to reply. 435 U.S. at 809 (White, J., dissenting). Footnote 32 merely suggests that large corporate expenditures during a political campaign are less likely to have an unfair impact if the voters are aware of the fact that significant

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recordkeeping by the recipients of political contributions. A larger $100 threshold was established for required disclosure of campaign contributions and expenditures. (Resp. Br. 39).

Moreover, since *Buckley*, the threshold for disclosure of independent expenditures has been increased in 2 U.S.C. § 434(c)(1) to $250, far more than the costs of production and distribution of a few leaflets by a lone streetcorner leafletter.

Under the Ohio Election Code, there is a threshold of $25 for reporting campaign committee contributions and expenditures. Ohio Op. Atty. Gen. No. 75-068 (1975). Unfortunately, no such threshold protects independent referendum leafletters like Mrs. McIntyre.

corporate financial expenditures on behalf of a particular electoral outcome have been made.[8]

C. The Commission's assertion that there is no current need for anonymous political leafletting is wrong.

The Commission argues that America no longer needs to protect anonymity in political discourse because there is no risk of seditious libel prosecutions. (Resp. Br. 30-34). In making this argument, the Commission misses the point. Section 3599.09 imposes a disclosure requirement which, because it applies to lone protestors handing out their election-related leaflets in public places, inevitably creates the worry about retaliation in one form or another. Public officials may choose to respond by finding ways to retaliate; private citizens who strongly disagree may, in some cases, stoop to harassment.

In fact, § 3599.09 facilitates the kind of retaliation or harassment that a lone protestor has legitimate reason to worry about. An independent citizen who leaflets in public places must put her name and home or business address on the leaflet. In contrast, if the same leaflet is sponsored by a political organization or a political party, then it only need contain the name and business address of the organization's chairman, treasurer or secretary. As a practical matter, what this means is that leaflets distributed by established political organizations can be identified by means that do not require

[8]On the other hand, there are circumstances in which a trivial corporate expenditure would be too small to trigger such a concern that the corporation's expenditure would have a meaningful impact on the outcome of a referendum. In such a case, one presumes that the same limits on reporting minimal contributions that protect the privacy of small personal contributions and expenditures would also apply to corporate expenditures.

the responsible party officials to publicly disclose their home addresses. In contrast, private citizens like Mrs. McIntyre who cannot shield themselves behind a business address must be willing to give their home addresses as well as their names and thereby run the risk of hostile responses directed at their homes.

III. SECTION 3599.09 IS UNCONSTITUTIONAL AS APPLIED.

The Commission's brief does not directly address the petitioner's argument that the § 3599.09 disclosure requirement is unconstitutional as applied to leaflets communicating her opinions and advocating defeat of a referendum on a school tax levy. In a distortion of the record in this case, the brief suggests that, at the original hearing, the Commission had the question of fraud before it. (Resp. Br. 2). The Commission's brief also contains the assertion that, in addition to banning anonymous election-related leafletting, § 3599.09 "prohibits the 'attribution statement' from being false or fraudulent." (Resp. Br. 6).

Neither of these assertions is true. The sole issues considered and determined at the Commission's original hearing in this case were whether the petitioner's name and address appeared on her leaflets and whether she had violated filing and reporting requirements. She was not charged with fraud nor was she guilty of fraud.[9]

The Commission's innuendo of election fraud is based upon the reference "Concerned Parents and Taxpayers" in

[9]Charges against Mrs. McIntyre for violating Ohio Revised Code § 3517.10(D) (failure to file a designation of treasurer) and § 3517.13(E) (failure to file a PAC report) were dismissed.

petitioner's anonymous leaflets. (JA 6-7, 36-39). The Commission's assertion that petitioner McIntyre put the name of a "fictitious organization" on her leaflets distorts the record. (Resp. Br. 1). The record shows that the reference to "Concerned Parents and Taxpayers" is not a reference to an organization. On the contrary, as Mrs. McIntyre explained in response to questions of a commissioner, it is a reference to the fact that the petitioner, a parent of Westerville public school students, believed that her leaflets expressed not only her views, but the views of other like-minded parents and taxpayers with whom she had communicated. (J.A. 38-39). Such allusions to like-minded citizens are common and do not, by themselves, create formal political organizations.[10] Thus, in *Colten v. Kentucky*, 407 U.S. 104 (1972), when Justice Douglas used the terms "We the people" and "We Americans," he could hardly have been accused of speaking fraudulently on behalf of fictitious groups. 407 U.S. at 122 (Douglas, J., dissenting).

Even if Mrs. McIntyre's leaflets were literally within the coverage of § 3599.09, the statute cannot be constitutionally applied to cover this form of political speech. This Court made this point clearly in *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 265 (1986): "Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation."

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[10]*See*, for example, *State of Ohio, ex rel. Taft v. Court of Common Pleas of Franklin County*, 63 Ohio St.3d 190, 586 N.E.2d 114 (1992) (reapportionment advocacy group not a PAC; *United States v. National Committee for Impeachment*, 469 F.2d 1135, 1140 (2d. Cir. 1972) (publication of advertisement by committee seeking impeachment of the president did not alone make the committee a "political committee").

Finally, the Commission's claim that the § 3599.09 disclosure requirement prohibits false and fraudulent attribution statements is equally specious. Section 3599.09 is a ban on all anonymous election-related leaflets and similar materials. It contains no reference to false or fraudulent information of any kind. Other sections of the Ohio Elections Code, not charged or applied in this case, prohibit false and fraudulent statements.[11]

CONCLUSION

For the foregoing reasons and the reasons stated in the petitioner's initial brief, this Court should reverse the decision of the Ohio Supreme Court and hold that § 3599.09 is unconstitutional on its face and as applied here.

Respectfully submitted,

STEVEN R. SHAPIRO
JOEL M. GORA
American Civil Liberties Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

DAVID GOLDBERGER
The Ohio State University
College of Law
Clinical Programs
55 West 12th Avenue
Columbus, Ohio 43210
(614) 292-6821
Counsel of Record

BARBARA P. O'TOOLE
Roger Baldwin Foundation of ACLU, Inc.
203 N. LaSalle Street
Suite 1405
Chicago, Illinois 60601
(312) 201-9470

GEORGE Q. VAILE
776 County Road 24
Marengo, Ohio 43334
(614) 747-2218

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[11]*See* footnote 4, *supra*.

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Respondent.

On Writ Of Certiorari
To The Supreme Court Of Ohio

BRIEF OF AMICI CURIAE FOR THE STATES OF TENNESSEE, ET AL., IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

At least 44 states and the District of Columbia presently have in effect some form of a political advertising disclosure statute similar to the Ohio statute at issue in this case. *See* Disclosure Statutes For Political Literature, Appendix, A-1 *et seq*. Although the language in these disclosure statutes may vary, the interest in an informed electorate remains constant. Accordingly, because of the potential applicability of a determination made here to the laws in other states, the Amici States advocate

upholding the constitutionality of Ohio Rev. Code § 3599.09 (Ohio law).

Political advertising disclosure statutes advance the important state interest in informing the electorate. The interest in providing information to voters is important because it reflects the First Amendment goal of disseminating information in order to permit the intelligent exercise of the right to vote. *See* "Developments in the Law – Elections," 88 Harv. L. Rev. 1111, 1290 (1975). Pre-election poll results often indicate the importance of undecided voters in determining the outcome of elections. Some of these voters do not make up their minds until they enter the voting booth. While voters may be informed regarding the big issues and major candidates (via the media and other means), they are often undecided about – or unaware of – less visible officers and ballot questions. Therefore, election day advocacy on these matters has the potential for a major impact on voter choices since reluctant or undecided voters are often easily swayed at the last minute. *See* W. Flanigan, *Political Behavior of the American Electorate*, p. 154 (2d ed. 1972).

In addition, large shifts in voter sentiment have been reported to occur more often during ballot elections than in candidate elections. *See* D. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States*, p. 172 (1984). These facts highlight the importance of providing voters with information regarding the source of political communication so that they may be in a better position to evaluate its validity and vote accordingly. Therefore, the

Amici States join in urging this Court to affirm the decision of the Ohio Supreme Court upholding the constitutionality of the Ohio law.

ARGUMENT

The decision of the Ohio Supreme Court to uphold the constitutionality of the Ohio law, which requires the disclosure of publishers of campaign literature pertaining to the adoption or defeat of ballot propositions, against a First Amendment challenge should be affirmed. Clearly, this statute meets the standard of reasonableness for regulation of elections. Even if this Court were to apply strict scrutiny, the statute would still pass constitutional muster because the state interests in such a disclosure law are compelling and the statute is narrowly tailored to meet those interests.

I. Ohio Revised Code § 3599.09 Should Be Evaluated Under A Standard Of Reasonableness.

Constitutional challenges to state election laws should be analyzed under a more flexible standard of review. In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), this Court set forth a more relaxed standard of review to be applied in resolving constitutional challenges to state election laws. Under this flexible standard, the court first balances the character and magnitude of the asserted injury against the rights protected by the First and Fourteenth Amendments. *Id.* at 788. The Court then identifies and evaluates the precise interests asserted by the state, including the legitimacy, strength, and necessity of those

interests, to determine if the interests justify the burden imposed by the statute. *Id.* at 788.

The flexible standard of review should be applied to election laws because it is necessary to assure that states are not hobbled in their efforts to regulate elections to protect what this Court has found to be the most fundamental right – the right to vote. *Burson v. Freeman*, 112 S.Ct. 1846, 1851 (1992) ('the right to vote freely for the candidate of one's choice is of the essence of a democratic society' *quoting Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). In the present case, the burden that the Ohio law imposes on the petitioner's expressive activity does not outweigh Ohio's interests in fair election practices and an informed electorate. As a practical matter, there must be regulation of elections if they are to be conducted fairly and if the voters are to cast their votes intelligently and effectively. *Storer v. Brown*, 415 U.S. 724, 730 (1974).

Under the more flexible standard, the nature of the constitutional inquiry depends upon the extent to which the Ohio law infringes upon the petitioner's constitutionally-protected right. *Anderson v. Celebrezze*, 460 U.S. at 788. In the past, this Court has recognized that when a state election law only imposes a reasonable, nondiscriminatory restriction upon the protected right, the state's important regulatory interests are generally sufficient to justify the restriction. *Burson v. Freeman*, 112 S.Ct. at 1858; *Storer v. Brown*, 415 U.S. at 733. Requiring the identification of those circulating pamphlets to influence a ballot issue constitutes just such a reasonable and nondiscriminatory restriction since it neither impacts the content of the speech nor suppresses it. The procedural

burden of source disclosure is more than counterbalanced by Ohio's state interest in an informed electorate.

By providing the voters, to whom the message is directed, with a means to better evaluate political propaganda, the Ohio law furthers the state interest in accurate voter assessment of the issues. The end result of this reasonable, nondiscriminatory restriction is not to diminish political debate, but to encourage it by providing for additional information for use by an informed electorate. The source disclosure requirement of the Ohio law accomplishes such a purpose.

II. The State Interests In Political Advertising Disclosure Laws Are Sufficiently Compelling And Narrowly Tailored To Survive Strict Scrutiny.

Even if this Court determines that the disclosure statute is subject to strict scrutiny, the state interests are sufficiently compelling to justify the minimal intrusion on the petitioner's First Amendment rights. The Ohio Supreme Court identified two state interests in requiring disclosure by publishers of political literature during candidate and/or referenda elections. First, the Ohio Supreme Court noted that "the disclosure requirement is clearly meant to 'identify those responsible for fraud, false advertising and libel.' " *McIntyre v. Ohio Elections Commission*, 67 Ohio St.3rd 391, 394 (1993), *quoting Tally v. California*, 362 U.S. 60, 64 (1960). Second, the Ohio high court, in quoting *First National Bank of Boston v. Belloti*, 435 U.S. 765, 691-92 n.32 (1978), recognized that *"identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the*

arguments to which they are being subjected." McIntyre, 67 Ohio St.3rd at 395 (emphasis in original).

A number of other state appellate courts have articulated similar state interests in such a disclosure requirement:

(1) "A state has a strong and valid interest in preserving the integrity of the electoral process." *State v. Acey,* 633 S.W.2d 306, 307 (Tenn. 1982).

(2) Such disclosure statutes "ensure that voters have information which will aid them in assessing the bias, interest, and credibility of the person or organization disseminating the information about political candidates, and determining the weight to be given a particular statement." *Acey,* 633 S.W.2d at 307.

(3) "[T]he obvious purpose of [Kentucky Revised Statute] § 121.190(1) is to promote honesty and fairness in the conduct of election campaigns." *Morefield v. Moore,* 540 S.W.2d 873, 874 (1976).

(4) The statute "is an attempt to raise the ethical standards of political discussion to promote fair play and fair competition in politics, to banish cowards from the political arena, and extirpate the dirty business or surreptitious character assassination." *Commonwealth v. Evans,* 40 A.2d 137, 138 (Pa. Sup. Ct. 1944).

Lower federal courts have also articulated these interests as to similar state and federal regulations. In *United States v. Scott,* 195 F. Supp. 440, 443 (D. N.D. 1961), a federal district court upheld the constitutionality of the federal statute, 18 U.S.C. § 612, which requires disclosure

of publishers of campaign materials in federal elections, and recognized that:

> The Congress determined that in certain specified instances the writers of pamphlets must disclose their identity. And why was this done? So that the electorate would be informed and make its own appraisal of the reason or reasons why a particular candidate was being supported or opposed by an individual or groups.

Id. at 443. *See also, KVUE, Inc. v. Moore,* 709 F.2d 922, 937 (5th Cir. 1983) (Texas sponsorship requirements are "generally applicable and even-handed regulations that protect the integrity and reliability of the electoral process itself.")

Disclosure is justified by the state's interest in providing voters with a means to better evaluate the contents of political literature. Ohio's interest in assuring accurate voter assessment of political issues is compelling, especially in light of the fact that this interest is furthered by opening the channels of communication rather than restricting them. In *Burson v. Freeman,* 112 S.Ct. at 1851, this Court recognized that the State of Tennessee's interest in protecting its citizens' right to vote was a compelling one. Ohio's election statute continues in this tradition of protecting the right to vote by safeguarding the ability of its citizenry to make intelligent and informed decisions.

If the state's infringement on speech is to be scrutinized, so must the individual speaker's infringement on the right to vote by making an informed decision. This

Court has acknowledged that the unnecessary infringement on the right to vote is not to be tolerated in cases of incidental speculative impact on First Amendment rights: "Since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. at 555. Therefore, since the interests that the Ohio law seeks to preserve are compelling, they warrant the constitutional validation of the statute even under strict scrutiny.

The petitioner claims that none of the justifications for the disclosure requirement are "sufficient to uphold Ohio's ban on all anonymous campaign literature." Petitioner's Brief, pp. 29-30. In contrast, this Court has recognized that preservation of the integrity of electoral process is a compelling state interest. *American Party v. White*, 415 U.S. 767, 782 n.14 (1974); *see also, Anderson v. Celebrezze*, 460 U.S. at 789 n.9 (1983). Indeed, this Court, in *Storer v. Brown*, 415 U.S. at 730, acknowledged that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos is to accompany the democratic process."

Perhaps the most misleading aspect of the petitioner's argument is the characterization of the Ohio law as a "flat ban on distribution of anonymous leaflets." Petitioner's Brief, "Statement of the Issues." The Ohio law, like other similar state election laws, does not ban political speech. Rather, it requires disclosure of the person publishing such campaign literature in either candidate or referenda elections.

This Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) upheld the constitutionality of the disclosure requirements in the Federal Election Campaign Act of 1971 as amended in 1974. In upholding the constitutionality of these disclosure requirements, this Court justified any minimal intrusion upon First Amendment rights by a governmental interest remarkably similar to the one asserted to justify the disclosure requirements of the Ohio law and other similar state election laws. Three specific interests were articulated:

> First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. . . .
>
> Third, and not least significant, recordkeeping, reporting and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

Buckley, 424 U.S. at 67-68. If a law requiring detailed disclosure of campaign contributions and expenditures

by political candidates and/or political action committees is justified by these governmental interests, then it follows that a less-intrusive law requiring disclosure of the name and address of the publisher of campaign literature in candidate or referenda elections is also justified by those same interests.

In addition, the state interests in enforcing its campaign financial disclosure law, which have been recognized as compelling interests by this Court in *Buckley*, 424 U.S. at 67-68, are furthered by a requirement that campaign literature include the name of the publisher of the literature. In *Bemis Pentecostal Church v. State*, 731 S.W.2d 897 (Tenn. 1987), a group of churches in Jackson, Tennessee opposed a liquor-by-the-drink referendum and spent money publishing advertisements which opposed the referendum in the local newspaper. In compliance with Tennessee's requirement that the publisher of campaign advertisements be disclosed, the advertisement "identified the sponsoring church." *Bemis Pentecostal Church*, 731 S.W.2d at 899. Based on this information, local election officials determined that these churches had failed to file their campaign financial disclosure statements in compliance with Tennessee's Campaign Financial Disclosure Law. If it were not for the churches' compliance with the requirement to disclose the publisher of the advertisement, the Campaign Financial Disclosure Law in Tennessee would have gone unenforced in that instance.

As to the alleged constitutional infirmities of the Ohio Law, the petitioner contends that the statute is not narrowly drawn to further the state interests articulated by the Ohio Supreme Court. Petitioner's Brief, pp. 35-39. Specifically, the petitioner focuses upon the state interest

in prohibiting fraudulent, false or libelous statements. *Id.* at 36. Such an argument ignores other articulated state interests, including perhaps the most basic and fundamental interest recognized by this Court in *Buckley* and a number of lower courts previously cited – namely, to inform the electorate "as to where political campaign money comes from and how it is spent." *Buckley*, 424 U.S. at 67; *Acey*, 633 S.W.2d at 307; *Scott*, 195 F. Supp. at 443. Without such a disclosure requirement, voters have no way of knowing who published particular campaign leaflets handed to them on election day as they prepare to vote. The Ohio law, like other similar state election laws, is narrowly tailored to further the state interest in providing voters with such information so that they may make an informed decision.

The petitioner argues in the alternative that, even if the Ohio statute is facially valid, it cannot be constitutionally applied to the "distribution of anonymous leaflets opposing passage of a referendum on a school tax levy." Petitioner's Brief, p. 39. In *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299-300 (1981), this Court, in striking down a limitation on contributions and referenda elections, acknowledged that, in the context of a referenda election, "the integrity of the political system will be adequately protected if contributions are identified in a public filing revealing the amounts contributed." Likewise, lower courts have upheld the constitutionality of campaign financial disclosure requirements in the context of referenda elections. *See Bemis Pentecostal Church*, 731 S.W.2d at 907 ("The act serves a number of legitimate and compelling state interests, ranging from the maintenance of free, open, and fair elections, to dissemination of

campaign information to voters, to prevention of corruption and fraud, to records-keeping to permit effective enforcement of the Act.")

Ensuring that the electorate is fully informed in referenda elections is perhaps even more important than in candidate elections. Surveys have shown that voters are more likely to change their minds in referenda elections than candidate elections:

STABILITY OF VOTING INTENTIONS
IN CALIFORNIA CANDIDATE
AND PROPOSITION CONTESTS, 1960-82

Change In Voting Intentions	Type of Election: Candidate		Proposition		Total	
Little[a]	77%	(27)	28%	(10)	51%	(37)
Moderate[b]	11	(4)	19	(7)	16	(11)
Significant[c]	14	(5)	53	(19)	33	(24)

Source: California Polls, 1960-82, The Field Institute, San Francisco, California.

[a]Roughly the same margin of preferences persisted throughout the campaign.

[b]There were significant changes in the margin of preferences, but the side that led all along won.

[c]There were significant changes in voting intentions as the campaign preceeded; the side that had at one time been far behind won.

Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* (1984) p. 172.

With 53% of the voters in referenda elections making a significant change in their voting intentions as the campaign proceeds, there is no doubt that last minute leaflets handed out to voters at the polling place may have a significant impact on a voter's decision. These facts highlight the necessity of the Ohio law as applied to referenda elections, which requires disclosure at a crucial moment in the election process. Thus, the Ohio law is narrowly tailored to further the state's compelling interest in an informed electorate.

CONCLUSION

The Amici States urge this Court to affirm the decision of the Ohio Supreme Court upholding the constitutionality of the Ohio statute requiring disclosure of the publishers of campaign literature distributed in candidate and referenda elections.

Respectfully submitted,

CHARLES W. BURSON
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

MICHAEL W. CATALANO
Associate Solicitor General
Attorney General's Office
Executive Offices
500 Charlotte Avenue
Nashville, Tennessee 37243-0497
(615) 741-3499

DISCLOSURE STATUTES FOR POLITICAL LITERATURE

State	Candidate	Referendum	Pamphlets Handbills Circulars	Periodicals Newspapers	TV or Radio
Alabama (§17-22A-13)	Yes		Yes	Yes	Yes
Alaska (§15.56.010)	Yes	Yes	Yes	Yes	Yes
Arizona (§19-128; §16-912)	Yes	Yes	Yes	Yes	Yes
Arkansas (§7-1-103)	Yes	1	Yes	Yes	
Colorado (§1-13-108)	Yes	2	Yes	Yes	
Connecticut (§9-333w)	Yes	Yes	Yes	Yes	
Delaware (15:§8023)	Yes	No	Yes	Yes	Yes
Washington, D.C. (§1-1420)	Yes	Yes	Yes	Yes	
Florida (§106-143/1437/144)	Yes	3	Yes	Yes	Yes
Georgia (§21-2-415)	Yes	Yes	4	Yes	
Hawaii (§11-215)	Yes		5	6	Yes
Idaho (§67-6614A)	Yes	Yes	Yes	Yes	Yes
Illinois (10:§5/29-14)	Yes	Yes	Yes	Yes	
Indiana (§3-14-1-4)	Yes	Yes	7	Yes	Yes
Iowa (§56.14)	Yes	Yes	Yes	Yes	
Kansas (§25-4156)	Yes			Yes	Yes
Kentucky (§121.90)	Yes		Yes	Yes	Yes
Louisiana (18:§1463)	Yes	Yes	Yes	8	Yes
Maine (21:§1575)	Yes	Yes	Yes		
Maryland (33:§26-17)	Yes		9		
Michigan (§169.247)	Yes	Yes	Yes	Yes	Yes
Minnesota (§211B.04)	Yes	Yes	10	Yes	Yes
Mississippi (§23-15-899)	Yes		Yes	Yes	Yes
Missouri (§130.031)	Yes	Yes	Yes	Yes	Yes
Montana (§13-35-225)	Yes	Yes	Yes	Yes	Yes
Nebraska (§49-1474.01)	Yes	Yes	Yes	11	Yes
Nevada (§294A.320)	Yes	Yes	Yes	Yes	Yes
New Hampshire (§664:14)	Yes	Yes	Yes	Yes	Yes
New Jersey (§19:34-38.1)	Yes	Yes	Yes	Yes	
New Mexico (§1-19-16/17)	Yes	Yes	Yes		
North Carolina (§163-274)	Yes		Yes	Yes	

State	Candidate	Referendum	Pamphlets Handbills Circulars	Periodicals Newspapers	TV or Radio
North Dakota (§16.1-10-04.1)	Yes	12	Yes	Yes	Yes
Ohio (§3599.09)	Yes	Yes	Yes	Yes	Yes
Oklahoma (21:§1840)	Yes	Yes	Yes	Yes	Yes
Oregon (§260.522)	Yes	Yes	Yes	Yes	Yes
Rhode Island (§17-23-1/2)	Yes	Yes	Yes	Yes	
South Carolina (§8-13-1354)	Yes	Yes	Yes		Yes
South Dakota (§12-25-4.1)	Yes	Yes	Yes		Yes
Tennessee (§2-19-120)	Yes	Yes	Yes	Yes	Yes
Texas (15:§255.001)	Yes	Yes	Yes	Yes	Yes
Utah (§20-14-24)	Yes			Yes	
Vermont (35:§2022)	Yes	Yes	Yes	Yes	
Virginia (§24.2-1014)	Yes	Yes	Yes	Yes	Yes
Washington (§42.17.510)	Yes	Yes	Yes	Yes	Yes
West Virginia (§3-8-12)	Yes		Yes	Yes	
Wisconsin (§11.30)	Yes		Yes	Yes	Yes
Wyoming (§22-25-110)	Yes		Yes	Yes	Yes

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1. "any printed material of a political nature"
2. "relating to any issue"
3. "any advertisement intended to influence public policy"
4. "distribute . . . circulate . . . disseminate"
5. "circulated, distributed"
6. "published"
7. "circulates"
8. "publish"
9. "campaign material"
10. "circulated"
11. "printed matter"
12. See decisions under prior law